(1) Supreme Court, U.S.
FILED
01 707 SEP 10 2001
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SUZANNE HANSARD,

Petitioner,

v.

REDDING RANCHERIA,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California for the Third Appellate District

PETITION FOR WRIT OF CERTIORARI

DUGAN BARR
DUGAN BARR & ASSOCIATES
1824 Court Street
P.O. Box 994390
Redding, CA 96001
(530) 243-8008
Counsel of Record

40 pp

QUESTION PRESENTED

Whether an Indian tribe enjoys sovereign immunity for a tort committed by the tribe while the tribe is outside of Indian country.

PARTIES TO THE PROCEEDING

The petitioner in this case is Suzanne Hansard. The respondent is Redding Rancheria. No party is a non-governmental corporation within the purview of Rule 29.6.

TABLE OF CONTENTS

Page #

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES ..... iv-v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I. THE DECISION BELOW GOES BEYOND THIS COURT'S HOLDING IN KIOWA TRIBE OF OKLAHOMA v. MANUFACTURING TECHNOLOGIES, INC., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) 6

II. THE DECISION BELOW DENIES TO PETITIONER THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION 15

III. THE DECISION BELOW VIOLATES THE NINTH AMENDMENT TO THE UNITED STATES CONSTITUTION 17

IV. THE DECISION BELOW VIOLATES THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES — Page #

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc. (1998) 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 ..... 6-12, 14, 15

Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145, 148-149, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 ..... 7, 10

Nevada v. Hall, 440 U.S. 410 (1979) 16

Puyallup Tribe, Inc. v. Department of Game of Wash. (1977) 433 U.S. 165, 175-176, 97 S.Ct. 2616, 2622-2623, 53 L.Ed.2d 657 ..... 8, 9

Redding Rancheria v. Superior Court (2001) 88 Cal.App.4th 384 ..... 1, 6

Turner v. United States (1919) 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 8

United States v. United States Fidelity & Guaranty Co. (1940) 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 8

STATUTES

28 U.S.C. § 1257(a) 2

28 U.S.C. §§ 1346, 1402, 2671 16

28 U.S.C. § 1605(a)(5) 17

California Civil Code section 1714 ..... 2, 3, 16

California Government Code section 810 16

UNITED STATES CONSTITUTION

U.S. Const., Art. I, § 8 ..... 2, 18

U.S. Const., Amd. 8 2

U.S. Const., Amd. 10 ..... 2, 18

RULES

Supreme Court Rules, Rule 29.6 ii

California Rules of Court, Rule 24 1

PETITION FOR A WRIT OF CERTIORARI

Suzanne Hansard respectfully petitions for a writ of certiorari to review the decision of the Court of Appeal of the State of California for the Third Appellate District in this case.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California for the Third Appellate District is reported at Redding Rancheria v. Superior Court (2001) 88 Cal.App.4th 384. The California Supreme Court denied review on June 13, 2001. By rule of court (California Rules of Court, Rule 24, subd. (a)), the decision in the Court of Appeal became final on that date.

JURISDICTION

The decision of the Court of Appeal of the State of California for the Third Appellate District was filed on April 6, 2001, and a timely petition for review in the California Supreme Court was denied on June 13, 2001. This court's

jurisdiction rests on 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause provides that: The congress shall have power...to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. U.S. Const., Art. I, § 8.

The Ninth Amendment provides:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. U.S. Const., Amd. 8.

The Tenth Amendment provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. U.S. Const., Amd. 10.

California Civil Code section 1714, subdivision (a), provides, in relevant part:

Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his

want of ordinary care or skill in the management of his property or person. Cal. Civ. Code § 1714, subd. (a).

STATEMENT OF THE CASE

This case arises out of a Christmas party at the Holiday Inn in Redding, California, which was given by Win River Casino, an Indian tribal entity of Redding Rancheria, for its employees. Redding Rancheria is a federally recognized Indian tribe. Suzanne Hansard, an employee of the Holiday Inn, was working as a bartender at the Christmas party on December 18, 1998. As the evening progressed and alcoholic libations flowed, the guests became increasingly raucous and rowdy. While Suzanne Hansard was working behind her bar, she was struck on the head by a gift box thrown by a casino manager passing out gifts to the casino's employees. The employees of Win River Casino are not necessarily members of the tribe.

After her injury, Suzanne Hansard brought an action against Win River Casino and other defendants for damages.

Win River Casino then filed a motion to quash service of summons and complaint asserting that it was entitled to tribal sovereign immunity, thereby depriving the Shasta County Superior Court of jurisdiction. Win River Casino's motion was opposed by Suzanne Hansard. The motion was denied by the Shasta County Superior Court on September 11, 2000.

Win River Casino, now styling itself Redding Rancheria, petitioned the Court of Appeal of the State of California for the Third Appellate District for a writ of mandate seeking to overturn the Superior Court's order denying the motion to quash service of summons and complaint. That petition was denied, whereupon Redding Rancheria sought review in the California Supreme Court. The California Supreme Court granted review and remanded the case to the Court of Appeal for the Third Appellate District with instructions to issue an alternative writ and hold a hearing.

The alternative writ was issued and the cause was argued and submitted on March 20, 2001. On April 6, 2001, the decision of the Court of Appeal for the Third Appellate

District was filed, commanding issuance of a writ of mandate requiring the trial court to vacate the order denying Redding Rancheria's motion to quash service of summons and complaint and ordering the trial court to enter a new order granting the motion.

Suzanne Hansard timely filed a petition for review in the California Supreme Court. That petition was denied on June 13, 2001.

The result is that petitioner, Suzanne Hansard, is denied recovery for her injuries under California's basic tort law from Redding Rancheria, the entity that set in motion the events which ultimately resulted in her injury. The consequence is that Suzanne Hansard may never be fully compensated for her injuries, while the wealthiest tortfeasor escapes all liability, unless this court intervenes.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW GOES BEYOND THIS COURT'S HOLDING IN KIOWA TRIBE OF OKLAHOMA v. MANUFACTURING TECHNOLOGIES, INC., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).

Relying largely on Kiowa Tribe of Oklahom., v. Manufacturing Technologies, Inc. (1998) 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (hereinafter, Kiowa Tribe), the Court of Appeal for the Third District held, "[A]n Indian tribe and its commercial entity are immune from an ordinary tort suit arising outside of Indian country." Redding Rancheria v. Superior Court (2001) 88 Cal.App.4th 384, at 386 (hereinafter, Redding Rancheria). The Court of Appeal found the tribal activity to be immunized whether or not tribal goals or tribal self-government was implicated. Redding Rancheria, at p. 388. But, the Kiowa Tribe court's holding was more restrictive in defining the scope of a tribe's immunity. The Kiowa Tribe court held: "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."

Kiowa Tribe, at 523 U.S. 760, 118 S.Ct. 1705. Here, the Court of Appeal decision goes well beyond the scope of the tribal immunity recognized by Kiowa Tribe and is not supported by the actual holding of Kiowa Tribe. On the other hand, other decisions of this Court support a refusal to extend tribal immunity for off-reservation torts.

Prior to Kiowa Tribe, it was clearly established that, "absent express federal law to the contrary, Indians going beyond reservation boundaries have been generally held subject to non-discriminatory state law otherwise applicable to all citizens of the state." Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145, 148-149, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (hereinafter, Mescalero Apache Tribe). Unless Kiowa Tribe is expanded beyond the confines of its actual holdings, the rule of Mescalero Apache Tribe remains good law.

As the majority in Kiowa Tribe admit, the doctrine of Indian tribal immunity is judge-made law. Kiowa Tribe, at 523 U.S. 754 and 759, 118 S.Ct. 1703 and 1705. In theory, then,

there is no valid reason why this court could not place constraints on tribal immunity for torts committed by the tribe outside of Indian country. In point of fact, as Justice Stevens pointed out in his dissent in Kiowa Tribe, the two earliest Supreme Court opinions cited by the majority as the genesis of the doctrine of tribal sovereign immunity, Turner v. United States (1919) 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (Turner) and United States v. United States Fidelity & Guaranty Co. (1940) 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (USF&G), both arose out of conduct that occurred on Indian reservations. Kiowa Tribe, at pp. 761-762, dissenting opinion of Stevens.

In Supreme Court cases after USF&G, the Supreme Court made it clear that the states have legislative jurisdiction over the off-reservation conduct of Indian tribes, and even over some on-reservation activities. Kiowa Tribe, at 523 U.S. 762, 118 S.Ct. 1706. In Puyallup Tribe, Inc. v. Department of Game of Wash. (1977) 433 U.S. 165, 175-176, 97 S.Ct. 2616, 2622-2623, 53 L.Ed.2d 657, the Supreme Court rejected

the Puyallup Tribe's claim that its tribal immunity precluded the state of Washington from regulating fishing activities on its reservation. As the dissent in Kiowa Tribe observed, since the Puyallup Tribe decision and up until the Kiowa Tribe decision, the Supreme Court had considered the doctrine of tribal sovereign immunity only in considering controversies arising on reservation territory. Kiowa Tribe, at 523 U.S. 763, 118 S.Ct. 1707. Prior to Kiowa Tribe, the Supreme Court had never applied the doctrine of tribal sovereign immunity to conduct which occurred entirely off-reservation. Kiowa Tribe, at 523 U.S. 764, 118 S.Ct. 1707. In making this point, Justice Stevens stated in his dissenting opinion at 523 U.S. 764, 118 S.Ct. 1707:

> "In sum, we have treated the doctrine of sovereign immunity from judicial jurisdiction as settled law, but in none of our cases have we applied the doctrine to purely off-reservation conduct. Despite the broad language used in prior cases, it is quite wrong for the court to suggest that it is merely following precedent, for we have simply never considered whether a tribe is immune from a suit that has no meaningful nexus to the tribe's land or its sovereign functions. Moreover, none of our opinions has attempted to set forth any reasoned explanation for a distinction between

> the states' power to regulate the off-reservation conduct of Indian tribes and the states' power to adjudicate disputes arising out of such off-reservation conduct."

Unless Kiowa Tribe is expanded beyond its actual, true holding, Mescalero Apache Tribe remains good law. When a tribe or tribal entity goes beyond the reservation boundaries, the tribe or tribal entity should be held subject to non-discriminatory state law otherwise applicable to all citizens of the state. Mescalero Apache Tribe, at 411 U.S. 148-149, 93 S.Ct. 1270. Mescalero Apache Tribe provides good authority for a decision by this court refusing to extend or expand Kiowa Tribe beyond its actual holding, which is limited to tribal immunity from suits on contracts, whether made on or off the reservation.

This is the very case which the dissent in Kiowa Tribe feared: The case of a person injured by a tort committed by the tribe outside of Indian country where the tort victim had no opportunity to negotiate for a waiver of sovereign immunity. Kiowa Tribe, at 523 U.S. 766, 118 S.Ct. 1708.

Even the majority in Kiowa Tribe doubted the wisdom of continuing in effect the doctrine of tribal sovereign immunity, let alone expanding its scope. The Kiowa Tribe court observed at 523 U.S. 758, 118 S.Ct. 1704-1705:

> "There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachment by states. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. See, Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973); Potawatomi, supra; Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims. [¶] These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule..."

Nevertheless, the Kiowa Tribe court deferred to Congress the issue of the continued existence of tribal immunity and/or its scope, even though the Court admitted that

the entire doctrine of tribal immunity was one created by the Court. Kiowa Tribe, at 523 U.S. 758, 759, 118 S.Ct. 1705.

The majority in Kiowa Tribe had good reason for doubting the wisdom of perpetuating the present doctrine of tribal immunity. That reason is best expressed by Justice Stevens' argument in his dissenting opinion in Kiowa Tribe. Justice Stevens observed at 523 U.S. 765, 766, 118 S.Ct. 1708:

> "Three compelling reasons favor the exercise of judicial restraint.
>
> First, the law-making power that the Court has assumed belongs in the first instance to Congress. The fact that Congress may nullify or modify the Court's grant of virtually unlimited tribal immunity does not justify the Court's performance of a legislative function. The Court is not merely announcing a rule of comity for federal judges to observe; it is announcing a rule that pre-empts state power. The reasons that undergird our strong presumption against construing federal statutes to pre-empt state law, see, e.g. Chipollone v. Liggett Group, Inc. (505 U.S. 504, 516, 518, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992), apply with added force to judge-made rules.
>
> In the absence of any congressional statute or treaty defining the Indian tribe's sovereign immunity, the creation of a federal common-law 'default' rule of immunity might in theory be justified by federal interests. By setting such a rule, however, the Court is not deferring to

Congress or exercising 'caution,' ante, at 1705 – rather, it is creating law. The Court fails to identify federal interests supporting its extension of sovereign immunity – indeed, it all but concedes that the present doctrine lacks such justification, ante, at 1704 – and completely ignores the State's interests. Its opinion is thus a far cry from the 'comprehensive pre-emption inquiry in the Indian law context' described in Three Affiliated Tribes that calls for the examination of 'not only the congressional plan, but also the nature of the state, federal, and tribal interests at stake...' 476 U.S., at 884, 106 S.Ct., at 2310 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145, 100 S.Ct. 2578, 2584-2585, 65 L.Ed.2d 665 (1980)). Stronger reasons are needed to fill the gap left by Congress.

Second, the rule is surprisingly anomalous. Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations? As a matter of national policy, the United States has waived its immunity from tort liability and from liability arising out of its commercial activities. See, 28 U.S.C. §§ 1346(b), 2674 (Federal Tort Claims Act); §§ 1346(a)(2), 1491 (Tucker Act). Congress has also decided in the Foreign Sovereign Immunities Act of 1976 that foreign states may be sued in the federal and state courts for claims based upon commercial activities carried on in the United States, or such activities elsewhere that have a direct effect in the United States. § 1605(a)(2). And a state may be sued in the courts of another state. Nevada v. Hall, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979). The fact that the states

> surrendered aspects of their sovereignty when they joined the union does not even arguably present a legitimate basis for concluding that the Indian tribes retained – or, indeed, ever had – any sovereign immunity for off-reservation commercial conduct.
>
> Third, the rule is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the Court's reasoning limits the rule for lawsuits arising out of voluntary contractual relationships. Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct."

The Kiowa Tribe majority's doubt, coupled with the dissent's argument in favor of judicial restraint, strongly counsel the court in this case to exercise that judicial restraint by refusing to extend and expand the doctrine of tribal immunity beyond that of the actual holding of Kiowa Tribe. No sound policy reason exists for absolving a tribe or tribal entity from the consequences of its tortious conduct committed outside the boundaries of Indian country, especially when that conduct occurs in the course of activity that has no impact on tribal self-governance or tribal self-sufficiency. No sound policy exists for creating a second class of citizens who may be

denied the full measure of recovery when they are injured by torts committed outside Indian country by a tribe or tribal entity, especially when the victim did not know he or she was dealing with the tribe and did not know about tribal immunity. Any expansion or extension of the doctrine of tribal immunity to immunize off-reservation torts committed by a tribe or tribal entity raises grave and fundamental constitutional equal protection and Tenth and Eleventh Amendment questions. The Court should grant certiorari to clearly limit the doctrine of tribal immunity to the actual holding of Kiowa Tribe, which applies only to actions on contracts. After all, parties to a contract can negotiate a waiver of tribal immunity; tort victims cannot.

II.

THE DECISION BELOW DENIES TO PETITIONER THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deny

to any person within its jurisdiction the equal protection of the laws." If the decision below is allowed to stand, Suzanne Hansard will have been effectively denied the equal protection of the laws of the State of California guaranteed to her by the Fourteenth Amendment.

California Civil Code section 1714 provides, in relevant part, that "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person." If the decision below is allowed to stand, Civil Code section 1714 will have no application to California Indian tribes. In derogation of the Fourteenth Amendment, Suzanne Hansard will have no remedy against Redding Rancheria for her injury. This denial of equal protection of the laws would not exist if Suzanne Hansard had been injured by a non-Indian, a non-Indian corporation, a sister state present in California (Nevada v. Hall, 440 U.S. 410 (1979)), the state of California (California Government Code section 810, et seq.), the United States (28 U.S.C. §§ 1346, 1402, 2671, et seq.), or a

foreign state present in California (28 U.S.C. § 1605(a)(5)).

This denial of equal protection is exacerbated even further when it is considered that the availability of recovery from tribal officers or employees may be severely limited and may well prove completely unavailing as a practical matter because of the absence of either indemnification from a tribe or from insurance. Indeed, what motivation is there for the tribe to purchase insurance for off-reservation torts when it can simply rely on the total immunity the decision below affords to the tribe?

III.

THE DECISION BELOW VIOLATES THE NINTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Ninth Amendment to the United States Constitution provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The only right enumerated in the Constitution which is material and relevant to this case is the power of Congress "to regulate commerce...with the

Indian tribes," found in Article 1, section 8, clause 3, of the U.S. Constitution. If the decision below is allowed to stand, that decision will effectively deny Suzanne Hansard's right to seek relief from the tribe in a California court for injuries inflicted on her by the tribe at the Redding Holiday Inn, a location that is outside of Indian country. As previously noted, any relief Suzanne Hansard may obtain from tribal officers or employees may be severely limited or even completely unavailable because of the absence of either indemnification from the tribe or from insurance.

IV.

THE DECISION BELOW VIOLATES THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Tenth Amendment to the U.S. Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

As previously noted, the only power delegated to the United States by the Constitution is the power of congress to

regulate commerce with the Indian tribes. In every other situation than the one which is the subject of the decision below, it cannot be refuted that the courts of the state of California have the power to entertain a suit by one citizen of California against another for a tortious injury inflicted on that citizen by the other within the territory of the state of California. The power of California courts to entertain a suit by a California citizen against an Indian tribe for a tort committed by the tribe outside of Indian country is nowhere prohibited to the state of California by the U.S. Constitution. That power is, accordingly, reserved to the state of California by the Tenth Amendment. If the decision below is allowed to stand, the Tenth Amendment becomes a mockery whenever an Indian tribe commits an off-reservation tort.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

Dated: October 16, 2001

DUGAN BARR
Counsel of Record

DUGAN BARR & ASSOCIATES
1824 Court Street
Redding, CA 96001
(530) 243-8008

JOHN D. BARR
11-13-01

Court of Appeal, Third Appellate District – No. C036723
S097502

IN THE SUPREME COURT OF CALIFORNIA

En Banc

REDDING RANCHERIA, Petitioner,

v.

SHASTA COUNTY SUPERIOR COURT, Respondent;

SUZANNE HANSARD, Real Party in Interest.

Petition for review DENIED.

Supreme Court
FILED
June 13, 2001
Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice

APPENDIX A

Date of Download: Sep 6, 2001
CA-ORCS (California Official Reports)
88 Cal.App.4th 384
Copr. © Bancroft-Whitney and West Group 1998

(Cite as: 88 Cal.App.4th 384)
105 Cal.Rptr.2d 773, 1 Cal. Daily Op. Serv. 2866, 2001
Daily Journal D.A.R. 3523

Court of Appeal, Third District, California.
REDDING RANCHERIA, Petitioner,
v.
THE SUPERIOR COURT OF SHASTA COUNTY,
Respondent;

SUZANNE HANSARD, Real Party in Interest.
No. C036723.
Apr. 6, 2001.

SUMMARY
An individual filed a tort action against an Indian tribal casino and several of its employees for injuries plaintiff received while she was working as a bartender at an off-reservation hotel hosting a party for the casino. The trial court denied the tribe's motion to quash service of summons, which the tribe made on the ground the casino was an economic enterprise of the federally recognized tribe and thus immune from suit. (Superior Court of Shasta County, No. 139088, George Nelson, Judge. [FN*])
FN* Retired judge of the former Justice Court of the Sanel Judicial District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX B

The Court of Appeal ordered issuance of a writ of mandate commanding the trial court to vacate the order denying the tribe's motion to quash and to enter a new order granting the motion. The court held that a tribal entity is treated as the tribe for immunity purposes, and tribal immunity applies to commercial as well as governmental activities. Tort suits are not excepted from the general immunity rule. However, the tribe's sovereign immunity would not prevent plaintiff from suing individual Indians. Any unfairness to plaintiff resulting from the tribe's immunity from suit was largely a product of plaintiff's litigation tactics. Although the tribe provided a mechanism to resolve civil suits by means of a hearing before the tribal council, plaintiff refused to follow that procedure. (Opinion by Morrison, J., with Blease, Acting P. J., and Hull, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Indians § 2--Tribes--Sovereign Immunity--Tort by Tribal Entity Outside Indian Country.

In an individual's tort action against an Indian tribal casino and several of its employees for injuries *385 plaintiff received while she was working as a bartender at an off-reservation hotel hosting a party for the casino, the trial court erred in denying tribe's motion to quash, which the tribe made on the ground the casino was an economic enterprise of the federally recognized tribe and thus immune from suit. A tribal entity is treated as the tribe for immunity purposes, and tribal immunity applies to commercial as well as governmental activities. Tort suits are not excepted from the general immunity rule. However, the tribe's sovereign immunity would not prevent plaintiff from suing individual Indians. Any unfairness to plaintiff resulting from the tribe's immunity from suit was largely a product of plaintiff's

litigation tactics. Although the tribe provided a mechanism to resolve civil suits by means of a hearing before the tribal council, plaintiff refused to follow that procedure.
[See 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, 100.]

(2a, 2b) Indians § 2--Tribes--Sovereign Immunity.
An aboriginal American tribe is a sovereign nation and as a matter of federal law, is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. No federal law grants California jurisdiction over off-reservation Indian torts. A state's power to regulate a tribe's conduct is not the same as a state's power to sue a tribe.

(3) Indians § 2--Tribes--Sovereign Immunity--Commercial Activity.
Tribal immunity applies to commercial as well as governmental activities, and no tribal goal is required to conclude a tribal activity is immunized. Nor is it necessary to determine whether, absent the immunity, a tribe's ability to self-govern would be infringed. The infringement test applies to individual Indians and is inapplicable to the exercise of state court jurisdiction over an Indian tribe that has invoked its sovereign immunity. Immunity for off- reservation conduct is not a matter of comity.

COUNSEL
Rapport & Marston and David J. Rapport for Petitioner.
No appearance for Respondent.
Dugan, Barr & Associates, Douglas Mudford and J. Michael Favor for Real Party in Interest.

*386 MORRISON, J.
Here we hold an Indian tribe and its commercial entity are immune from an ordinary tort suit arising outside of Indian country.

Suzanne Hansard (plaintiff) sued Win River Casino and several Does in Shasta County Superior Court. She alleged she was working as a bartender at a Redding hotel, attending to a party "for defendant Win River and its employees, who had booked one of the facility's banquet rooms[.]" "[O]ne or more" of the employees threw gifts into the crowd, and a package struck her, causing injury. She framed the complaint in terms of negligence, assault and battery.

Redding Rancheria (Tribe) moved to quash service of summons (Code Civ. Proc., 418.10, subd. (a)(1)), alleging Win River Casino is "an economic enterprise of the Redding Rancheria, a federally recognized Indian tribe," and, hence, immune from a state tort suit. The Tribe also alleged: "Plaintiff failed to exhaust her tribal administrative remedies, which, under tribal law, is a prerequisite to filing suit." The facts regarding the Tribe's status, tribal laws, and the structure of Win River Casino as a tribal enterprise were supported by a declaration of the Tribe's attorney. In part, she declared: "The Tribe owns and operates the Win River Casino which is located within the exterior boundaries of the Tribe's Reservation in Shasta County. All persons who work in the casino enterprise are tribal employees." Although plaintiff had submitted her claim to the tribal council pursuant to a tribal claims ordinance, she declined to allow the council to adjudicate her claim; according to an annexed letter by her lawyer, plaintiff believed the fact all Tribe members had an economic interest in the casino would render the proceedings unfair.

In opposition, plaintiff filed a declaration explaining she was just doing her job at the hotel, had no knowledge of any tribal immunity, and had never consented "to waive any of my rights as a citizen of [the] State of California or the United

States of America." Had she understood the immunity now claimed by the Tribe, for conduct occurring off tribal lands, "I very likely would have declined to work the party." She presented no evidence to contest the casino's status as a tribal entity, nor that she had submitted a claim to the Tribe.

At the hearing, the Tribe urged all of the legal points raised by plaintiff's opposition had been rejected by the United States Supreme Court decision, Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc. (1998) 523 U.S. 751 [118 S.Ct. 1700, 140 L.Ed.2d 981] (Kiowa). The trial court denied the *387 motion, stating in part: "I can see that if they were running a business off reservation, but I can't see it here where it's a tort action."

(1a) A formal order denying the motion was served on the Tribe; the Tribe responded by filing a petition for writ of mandate. We issued an alternative writ. We now grant the Tribe's prayer for relief, for the reasons that follow.

(2a) 1. An aboriginal American tribe is a sovereign nation and "As a matter of federal law, ... is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." (Kiowa, supra, 523 U.S. at p. 754 [118 S.Ct. at p. 1702]; see Great Western Casinos, Inc. v. Morongo Band of Mission Indians (1999) 74 Cal.App.4th 1407, 1419-1420 [88 Cal.Rptr.2d 828] (Morongo Band).) Plaintiff does not point to any federal law which grants California jurisdiction over alleged off-reservation Indian torts. In some cases, the United States Supreme Court has looked to organic acts to determine whether Congress granted a state power to regulate off-reservation Indian conduct. (E.g., Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145, 148-150 [93 S.Ct. 1267, 1270-1271, 36 L.Ed.2d 114, 119-120] [New Mexico may levy nondiscriminatory

taxes on off-reservation Indian ski resort, based on provision of Enabling Act for New Mexico]; Kake Village v. Egan (1962) 369 U.S. 60 [82 S.Ct. 562, 7 L.Ed.2d 573] [considering effect of Alaska Statehood Act on tribe's right to fish].) But a state's power to regulate a tribe's conduct is not the same as a state's power to sue a tribe. (See Oklahoma Tax Com'n v. Potawatomi Tribe (1991) 498 U.S. 505, 511-514 [111 S.Ct. 905, 910-912, 112 L.Ed.2d 1112, 1121-1123] (Potawatomi) [state may impose tax on Indian cigarette sales to non-Indians, but may not sue tribe to collect tax; "There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives"].) In any event, we find nothing in California's organic act (Act for Admission of the State of California, 9 Stat. 452), nor in any other federal law, which grants California any special power over Indian tribes. (See Long v. Chemehuevi Indian Reservation (1981) 115 Cal.App.3d 853 [171 Cal.Rptr. 733] (Long) [tribe immune from tort suit, reviewing federal law and finding no Congressional waiver of immunity]; Middletown Rancheria v. Workers' Comp. Appeals Bd. (1998) 60 Cal.App.4th 1340 [71 Cal.Rptr.2d 105] [Workers' Compensation Appeals Board lacks jurisdiction over tribe].) Plaintiff attempts to analogize the tribal claim system with California's Tort Claims Act, but this mixes apples and oranges. (See Long, supra, at p. 858, fn. 6 ["Longs mistakenly rely on various California statutes. They fail to recognize that Congress, not the California Legislature, is the entity that controls the extent to which states may exercise jurisdiction over Indian tribes"].) *388

(1b),(3) 2. Tribal immunity applies to commercial as well as governmental activities: "Our cases allowing States to apply their substantive laws to tribal activities are not to the contrary. We have recognized that a State may have authority

to tax or regulate tribal activities occurring within the State but outside Indian country. [Citations.] To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit." (Kiowa, supra, 523 U.S. at p. 755 [118 S.Ct. at p. 1703] [pointing to Potawatomi case].) Contrary to plaintiff's view, no "tribal goal" is required to conclude a tribal activity is immunized. Nor is it necessary to determine whether, absent the immunity, a tribe's ability to self-govern would be infringed. (See Padilla v. Pueblo of Acoma (1988) 107 N.M. 174, 178 [754 P.2d 845, 849] (Padilla) ["the infringement test applies to individual Indians and is inapplicable to the exercise of state court jurisdiction over an Indian tribe that has invoked its sovereign immunity"].) Padilla, relied on by plaintiff, did conclude immunity for off- reservation conduct "is solely a matter of comity." (Id. at p. 179 [754 P.2d at p. 850], cert. den. sub nom. Pueblo of Acoma v. Padilla (1989) 490 U.S. 1029 [109 S.Ct. 1767, 104 L.Ed.2d 202] [White, J., dis. from denial of cert., due to conflict among state courts on this question].) Well-reasoned cases have rejected this view. (See, e.g., Sac and Fox Nation v. Hanson (10th Cir. 1995) 47 F.3d 1061, 1064-1065 [rejecting analogy of Indian tribe to foreign sovereign; "we do not believe that the location of the commercial activity is determinative"]; In re Greene (9th Cir. 1992) 980 F.2d 590, 593-597 [questioning Padilla, "sovereign immunity, as it existed at common law, had an extra-territorial component"; Padilla "should have looked at the scope of tribal immunity under federal law, rather than the extent of comity afforded under state law"]; Morgan v. Colorado River Indian Tribe (1968) 103 Ariz. 425 [443 P.2d 421] (Morgan) [tribe immune from off-reservation tort suit]. See also Puyallup Tribe v. Washington Game Dept. (1977) 433 U.S. 165, 172- 173 [97 S.Ct. 2616, 2621-2622, 53 L.Ed.2d 667] [state could not sue tribe for off-reservation conduct, only tribal members].) The comity rationale has no

further viability. (See Kiowa, supra, 523 U.S. at p. 760 [118 S.Ct. at p. 1705] ["Tribes enjoy immunity from suits on contracts, ... whether they were made on or off a reservation"]; Thompson v. Crow Tribe of Indians (1998) 289 Mont. 358, 364 [962 P.2d 577, 581] [suit to cancel liens tribe filed with county recorder, "the fact that the Tribe's action in filing its tax liens occurred off-reservation is of no consequence as regards its defense of sovereign immunity," citing Kiowa].)

(1c) 3. A tribal entity is treated as the tribe for immunity purposes. (See Ninigret Development v. Narragansett Indian (1st Cir. 2000) 207 F.3d 21, 29 (Ninigret Dev. Corp.) ["The Authority, as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity"]; Chance v. Coquille Indian Tribe *389 (1998) 327 Or. 318, 321 [963 P.2d 638, 639].) Although plaintiff's answer argues the casino is not in legal effect an arm of the Tribe, plaintiff presented no evidence in the trial court to challenge the Tribe's evidence the casino was an arm of the Tribe. (Cf. Trudgeon v. Fantasy Springs Casino (1999) 71 Cal.App.4th 632, 637-645 [84 Cal.Rptr.2d 65] (Trudgeon) [analyzing factors to consider when to treat a tribal entity as, in legal effect, the tribe itself].) Trudgeon specifically held an Indian casino (a tribal corporation) was entitled to immunity because of the importance of gaming in promoting tribal self-determination, the close link between the tribe and the casino, and the existence of federal law promoting Indian gambling. (Id. at pp. 639-642.) Plaintiff does not analyze the facts linking the Win River Casino to the Tribe, but instead merely distinguishes the facts of her suit against the Tribe from the facts in other cases, by means of a statement of alleged facts about the party where she was injured. This statement of facts is unsupported by citation to the trial record or to any declaration under penalty of perjury. This is not the correct analysis of an immunity question: The

casino is either an arm of the Tribe for immunity purposes or it is not, regardless of the nature of the suit.

4. Cases on state sovereign immunity (Muskopf v. Corning Hospital Dist. (1961) 55 Cal.2d 211 [11 Cal.Rptr. 89, 359 P.2d 457]) or sister state immunity (Hall v. University of Nevada (1972) 8 Cal.3d 522 [105 Cal.Rptr. 355, 503 P.2d 1363, 81 A.L.R.3d 1234]; Nevada v. Hall (1979) 440 U.S. 410 [99 S.Ct. 1182, 59 L.Ed.2d 416]), cited by plaintiff, are not relevant: "In [Blatchford v. Native Village of Noatak (1991) 501 U.S. 775 [111 S.Ct. 2578, 115 L.Ed.2d 686]], we distinguished state sovereign immunity from tribal sovereign immunity, as tribes were not at the Constitutional Convention. They were thus not parties to the 'mutuality of ... concession' that 'makes the States' surrender of immunity from suit by sister States plausible.' [Citations.] (2b) So tribal immunity is a matter of federal law and is not subject to diminution by the States." (Kiowa, supra, 523 U.S. at p. 756 [118 S.Ct. at p. 1703]; see In re Greene, supra, 980 F.2d at pp. 593-595 [distinguishing state immunity from tribal immunity]; Long, supra, 115 Cal.App.3d at p. 857, fn. 3 ["Longs confuse the distinct doctrines of state and tribal immunity in their analysis of Nevada v. Hall [(1979) 440 U.S. 410 [99 S.Ct. 1182, 59 L.Ed.2d 416]]"].)

(1d) 5. Tort suits are not excepted from the general immunity rule. "There are reasons to doubt the wisdom of perpetuating the doctrine.... Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non- Indians. [Citations.] In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort *390 victims." (Kiowa, supra, 523 U.S. at p. 758 [118 S.Ct. at p. 1704], italics added; see also id. at p. 766 [118 S.Ct. at p. 1708] (dis. opn. of Stevens, J.) ["[T]he rule is

unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships"]; Trudgeon, supra, 71 Cal.App.4th at pp. 637, 644-645 [tort suit against tribal casino barred]; Morgan, supra, 103 Ariz. 425 [443 P.2d 421].) Any change or limitation of the doctrine (e.g., to exclude off-reservation tort suits) must come from Congress. (See Kiowa, supra, 523 U.S. at pp. 758-760 [118 S.Ct. at pp. 1704-1706].)

6. The Tribe's sovereign immunity does not prevent plaintiff from suing individual Indians, and the writ petition reflects plaintiff has named three individuals formerly sued as Does. Unless those individuals can show they were tribal officials acting within the scope of their authority by throwing gifts into a crowd (assuming these named individuals actually did such an act), they will not be protected by tribal immunity. (Morongo Band, supra, 74 Cal.App.4th at p. 1421; Trudgeon, supra, 71 Cal.App.4th at pp. 643-644; 4 Witkin, Cal. Procedure (4th ed. 2000 supp.) Pleading, 100, p. 22.) The allegations of the complaint, liberally construed, can be taken to mean these individuals acted wantonly, in derogation of any official duties, despite boilerplate allegations and legal conclusions of joint liability and ratification. (Cf. Trudgeon, supra, 71 Cal.App.4th at p. 644.)

7. Any unfairness here is largely a product of plaintiff's litigation tactics. Although the Tribe provides a mechanism to resolve civil suits, literally by means of a hearing before the sovereign, the tribal council, plaintiff refused to follow this procedure. (See Morongo Band, supra, 74 Cal.App.4th at pp. 1420-1421 [tribe waived immunity subject to specified conditions, which plaintiff failed to satisfy].) The tribal ordinance applies "to all claims for money or damages,

whether based on contract, tort or other cause of action." Plaintiff's counsel's letter to the Tribe states in part: "When I first submitted a claim to the council, I understood that the purpose of the submission was to provide the council with information so that its members could understand the case in order to grant a waiver of immunity." Any such understanding arose apart from the ordinance, which states in part: "Nothing in this Chapter shall be deemed to waive the sovereign immunity of the Redding Rancheria Tribe or any of its enterprises, officers, agents, or employees." (Cf. Ninigret Dev. Corp., supra, 207 F.3d at pp. 29-31 ["explicit language broadly relegating dispute resolution to arbitration constitutes a waiver of tribal sovereign immunity, whereas language that is ambiguous rather than definite, cryptic rather than explicit, or precatory rather than mandatory, usually will not achieve that end"].) Counsel's letter also states in part: "The less money Ms. *391 Hansard gets, the better it is for the tribe. It is fundamentally unfair for her to have to submit her claim for adjudication to anyone in such a position." However, "We presume, in view of the Tribe's obvious incentive to maintain good relations with its business clientele, that the tribal court can and will fairly adjudicate the matter." (Trudgeon, supra, 71 Cal.App.4th at p. 645; accord, Ninigret Dev. Corp., supra, 207 F.3d at p. 34 ["The unsupported averment that non-Indians cannot receive a fair hearing in a tribal court flies in the teeth of both congressional policy and the Supreme Court precedents establishing the tribal exhaustion doctrine"]; Calvello v. Yankton Sioux Tribe (1998) 1998 S.D. 107 [584 N.W.2d 108, 116-117] [suit for wrongful termination of casino manager, "By our decision, Calvello might not be deprived of his day in court, but only his day in the court of his choice"].) Although plaintiff did not choose to interact with the Tribe and did not go into Indian country (as did the plaintiff in Trudgeon), we cannot assume the Tribe's claims mechanism

operates unfairly. No doubt, plaintiff's employer would not re-let the banquet hall to the Tribe if its court system proved to be a sham, nor would other local businesses be eager to do business with the Tribe. Although a tribe's legal system may differ widely from the common law system, that does not mean the Tribe's system is fundamentally unfair. For example, according to plaintiff's counsel, this Tribe's system calls for a hearing before the tribal council, which has the power to render a binding decision, presumably without the onerous and lengthy jury trial procedures and appeals available in civil court. That members of the tribal council may share in tribal profits does not mean they cannot be fair when presented with a just claim.

Disposition

Let a writ of mandate issue, commanding the trial court to vacate the order denying the Tribe's motion to quash and to enter a new order granting the motion. Plaintiff shall pay the Tribe's costs of this proceeding.

Blease, Acting P. J., and Hull, J., concurred. *392

Cal.App.3.Dist.,2001.

REDDING RANCHERIA, Petitioner, v. THE SUPERIOR COURT OF SHASTA COUNTY, Respondent; SUZANNE HANSARD, Real Party in Interest.

END OF DOCUMENT